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IN THE

Supreme Court of the United States

October Term, 1970
No. 1138

ROBERT GREGORY MICKEY, *et al.*,

Petitioners,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Department of the Superior Court, County of Los Angeles, State of California.

BRIEF OF RESPONDENT IN OPPOSITION.

Opinions Below.

The Los Angeles Municipal Court issued a formal opinion when the petitioners were adjudged guilty. The Appellate Department of the Los Angeles Superior Court affirmed the convictions with an unpublished written opinion.

Jurisdiction.

Petitioners appear to invoke the jurisdiction of this Court under Title 28, United States Code Section 1257(3).

Questions Presented.

Was the prosecution collaterally estopped under the due process and equal protection provisions of the Constitution? Were petitioners' convictions a violation of the First Amendment?

Statutes Involved.

The petition brings into question the First and Fourteenth Amendments of the United States Constitution and California Penal Code Sections 407 and 409.

Statement of Case.

Petitioners were charged by The People of The State of California in a verified complaint filed in the Municipal Court of the Los Angeles Judicial District with violating California Penal Code Section 407 and 409 as well as other sections of the California Penal Code. The complaint, as applicable to the petition herein, alleged that on January 9, 1969 a violation of Penal Code Sections 407 and 409 were committed by petitioners who "did wilfully and unlawfully remain present at the place of a riot, rout and unlawful assembly after having been lawfully warned to disperse."

Petitioners Burwell, Lewis, Lee, Tempkin, and Clifford Fried were adjudged guilty of violating California Penal Code Section 407. In addition, they and all other petitioners were adjudged guilty of violating California Penal Code Section 409. An appeal was taken to the Appellate Department of the Los Angeles Superior Court which Court affirmed the convictions on July 9, 1970. A petition for certification to the California Court of Appeal was denied.

The California Supreme Court denied a petition for writ of habeas corpus on November 18, 1970.

Statement of Respondent.

The arrest of petitioners took place on January 9, 1969 at San Fernando Valley State College in Los Angeles, California. This petition presents the same issues as considered by this Court in *Upgraft v. California*, October Term, 1970, No. 5627, 39 Law Week 3200 (See: *People v. Upgraft*, (1970) 8 Cal. App. 3d Supp. 1, 87 Cal. Rptr. 459), and *Hairston v. California*, October Term, 1970, No. 5736, 39 Law Week 3246 (See: *People v. Hairston* (1970) 8 Cal. App. 3d Supp. 19, 87 Cal. Rptr. 470).

Facts of Case.

On January 9, 1969 Delmar T. Oviatt was acting President of San Fernando Valley State College [R.T. p. 70, lines 7-14]. At 7:30 A.M. Oviatt signed an order indicating that the campus was in a state of emergency and that no meetings should take place [R.T. p. 144, See: People's Ex. 2].

At 11:00 P.M. on the evening of January 8, 1969 Oviatt was visited by Dr. Wallace Graves and Dr. Marvin Klotz of Valley State College. Graves and Klotz had attended a meeting in Pacoima. Graves told Oviatt that the mood of the meeting was as ugly as anything he had ever seen [R.T. p. 89, lines 14-22]. The mood of the meeting was homicidal. Black militants at the meeting were guilt stricken and stated that they would never again leave their brothers to the police even if it meant being killed [R.T. p. 90, line 15].

Graves and Klotz presented Oviatt a letter signed by twelve members of "the concerned faculty." The letter stated, in part, that "we believe violence is probable

on campus, and . . . to avoid further bloodshed and conflict on campus. . . ." [See: People's Ex. 1].

In ordering the campus closed Dr. Oviatt considered this letter along with past events in regard to Valley State College. On January 8, 1969, Dr. Oviatt was scheduled to speak at a meeting in Pacoima at 8:00 A.M. The meeting was cancelled because the Black Students Union wanted all action to be on campus; the campus was to be the focal point [R.T. p. 108, lines 4-8; p. 109, lines 5-8].

At approximately 10:00 A.M. on January 8, 1969 Oviatt received a phone call from an individual who identified himself as "Smith" of "United Students." "Smith" informed Oviatt that we have guns and intend to use them. "Smith" was sick and tired of having classes interrupted [R.T. p. 111, lines 1-12; p. 2542, lines 7-10]. When Oviatt told "Smith" that this was improper and undesirable, "Smith" told Oviatt "then you take care of it" and hung up [R.T. p. 112, lines 6-9].

At 11:00 A.M. on January 8, 1969 there was a meeting at the Forum area. The group numbering approximately 350 persons then marched to the Administration Building. The group met with Dean Wallis and then went back to the Forum at 11:30 [R.T. p. 112, lines 6-25; p. 114, lines 3-14; p. 115, line 5; p. 116, lines 1-3].

At 1:30 P.M. approximately 450 students marched to the Administration Building. Dean Wallis told the marchers that they would be arrested if they entered the Building [R.T. p. 119, lines 1-2; p. 121, lines 6-11; p. 122, lines 20-26; p. 123, lines 1-3]. Rev. James Hargett told Wallis that the marchers were going to peacefully go in and occupy the first floor of the build-

ing. Archie Chatman told Wallis that he knew the regulations. The crowd pushed Wallis and a security guard aside and entered the Building. Officers of the Los Angeles Police Department entered the lobby. The doors were closed. A broken ashtray was thrown through the window [R.T. p. 123, line 20; p. 124, line 3; p. 2531, lines 17-20]. Oviatt received reports that police officers and students were hurt [R.T. p. 124, lines 25-26].

On January 7, 1969 Oviatt arrived at Valley State College at 8:00 A.M. He was informed that President Blomgren wanted him to take over as acting President [R.T. p. 128, lines 1-19; p. 132, lines 1-8]. A group of people wanted a convocation reinstated. Half the group was non-campus people. The people were "angry" in manner and statements [R.T. p. 132, lines 14-26; p. 133, line 9; p. 134, line 22; p. 135, lines 18-26].

At approximately 1:40 P.M., 300 people marched from the Forum area to the Administration Building. Oviatt met the marchers 50 feet from the Building. The loud and boisterous crowd surrounded Oviatt. Two security officers made a path for him. As Oviatt returned to the Building he observed shoving in the crowd, arms flailing, and a student kneeling by the glass doors with his head down, his face covered and blood dripping on the pavement. The bleeding student was Larry Labowitz, a leader of a right wing student group. Labowitz had tried to set up a counter-movement to the S D S activity on campus [R.T. p. 137, lines 23-26; p. 139, lines 15-26; p. 141, lines 9-11; p. 308, line 19-26]. As a result of a fracas between student groups, one person was taken to the hospital [R.T. p. 328, lines 19-23].

In making the emergency order, Oviatt considered the events of November 4, 1968. On that date Valley State football players came to the Administration Building with the intent to go to the fifth floor and clean the black students out [R.T. p. 331, lines 19-23]. The black students took over the Building, locking doors, getting out the fire hoses, refusing to let people in and held administrators and secretaries hostage [R.T. p. 333, lines 1-26]. Deans, teachers, 20 secretaries and 2 electricians were threatened with knives and other instruments [R.T. p. 334, lines 1-26].

There were threats and physical violence to the hostages. Dr. Spencer was kicked and badly bruised. Dr. Holland was carried into the hallway and dropped on the floor. Purses of secretaries were searched. A knife was held at the throat of Dr. Arnett with the statement "if the police come, you go." They were held hostages for four hours. Dr. Blomgren was forced to sign a paper [R.T. p. 336, lines 8-16; p. 337, lines 1-26; p. 341, lines 18-19; p. 342, lines 3-6].

Oviatt also considered an event in March or April of 1968 at a eulogy for Martin Luther King. Archie Chatman in urging that black students should get guns and be prepared to use them said "take as many whites with you when you have to go, as you can. . . ." [R.T. p. 349, lines 22-26; p. 2542, line 19; p. 2543, line 3].

In Oviatt's view the march on January 7, 1969 was just like the event of November 4, 1968. It involved the same people and the same tactics: march to Building, make demands, move into further violence [R.T. p. 2522, lines 17-24; p. 2526, line 25; p. 2527, line 3]. When Archie Chatman would be present violence erupted on November 4, January 7, and January 8.

On November 4, the Building was taken over. On January 8, the Building was taken over [R.T. p. 2527, lines 16-26; p. 2528, lines 14-18].

On January 9, 1969 at 7:30 A.M. Dr. Oviatt felt the condition at the campus was truly an emergency situation. Chairs had been removed from the cafeteria contrary to school regulations [R.T. p. 397, lines 7-13; p. 404, lines 6-8]. Lou Herbst, director of food services, stood in the doorway of the cafeteria. He told six or seven people removing chairs not to take them to the Forum area. 75 to 100 chairs were removed [R.T. p. 1886, lines 9-16; p. 1887, lines 18-27].

Oviatt signed the emergency order and directed that it be distributed on the campus. Sally Brenneman had 10,000 copies printed [R.T. p. 2822, line 8]. She left 2,000 in the lobby of the Administration Building [R.T. p. 2827, line 20]. She distributed 8,000 on campus by putting some in the Sundial boxes and passing out some by hand [R.T. p. 2829, lines 23-24; p. 2831, line 14].

Stephen Crossland in a Los Angeles Police Department sound truck made three complete circuits of the campus. Approximately 35 times from 8:10 A.M. until 9:30 A.M. he read Dr. Oviatt's emergency order. People in the Forum area turned toward the truck as Crossland read the announcement. Crossland saw copies of the emergency order on the ground and in people's hands in the Forum area [R.T. p. 2801, lines 8-10; p. 2804, lines 1-13; p. 2809, line 10]. When Crossland read the order at 8:10 A.M., there were 75 people in the Forum Area. When Crossland read the order at 8:40 A..M., there were 150 people in the Forum Area. When Crossland read the order at

9:15 A.M. there were 250 people in the Foruma Area [R.T. p. 2802, line 24; p. 2804, lines 1-13; p. 2805, lines 14-17].

The Emergency Order was terminated on January 10, 1969 at 2:00 A.M. [R.T. p. 301, lines 6-8].

William T. Whisenhunt was a Los Angeles Police Officer assigned to undercover work at Valley State College. He would report to the Mobile Command Post as well as to Sergeant Frank Isbell [R.T. p. 415, line 24].

On December 20, 1968 Whisenhunt was in the Forum area. He observed an altercation between SDS and Students for Freedom. A fight occurred. One individual had a bloody nose. This incident was reported to the Mobile Command Post and to Isbell [R.T. p. 440, lines 6-15; p. 441, lines 21-23; p. 445, lines 12-23].

Within 20 minutes of the altercation, Whisenhunt overheard a conversation between 10 members of the BSU, including petitioners Burwell and Lewis. The conversation referred to the "fact" that the Freedom Students were lackeys of the administration. If they wanted to play, go ahead and burn the Administration Building down. This was reported to Isbell and to the Command Post [R.T. p. 446, lines 12-26; p. 452(a), lines 21-26; p. 454, lines 3-4].

On January 7, 1969 Whisenhunt was on campus. He made reports of what he observed [R.T. p. 454, lines 20-26]. There were SDS speakers present as well as Archie Chatman, appellants Burwell, Lewis, Lee and Clifford Fried. Speakers said that Oviatt was insensitive to demands of the BSU. The group was to go to the Administrators to have a confrontation with Oviatt. 100 people marched and the group

shouted for Oviatt to come down [R.T. p. 458, lines 6-9; p. 459, lines 7-13; p. 460, lines 3-14].

Oviatt attempted to speak but was shouted down. The group tightened around Oviatt pointing their fingers at him [R.T. p. 461, lines 18-26; p. 462, lines 1-26]. After Oviatt went into the Building, two fights broke out: One between Larry Labowitz and a BSU person; The second involved BSU people. The Labowitz fight lasted 10 seconds with Labowitz's glasses falling to the ground [R.T. p. 463, lines 13-14; p. 464, lines 15-23; p. 466; p. 467, lines 12-26; p. 468, lines 3-11]. This was reported to the Post and to Isbell [R.T. p. 470, lines 16-26].

On January 8, 1969 Whisenhunt was in the Forum area at 8:00 A.M. People were introducing themselves as off-campus persons. People from San Francisco State College told the groups what should be done to counteract police tactics. Rev. James Hargett, Margaret Wright (See: *Wright v. California*, (1970) 26 L. Ed. 2d 272) and Dr. Graves spoke. Some speakers urged using force when necessary [R.T. p. 473, lines 9-12; p. 474, lines 1-11]. Three hundred persons then marched to the Administration Building. They were to speak loud enough so that "people inside will hear." Twelve people entered the Building and were arrested [R.T. p. 475, lines 10-25; p. 477, lines 21-23; p. 479, lines 2-3]. Security guards attempted to close the door. Five persons pulled the door open with a guard holding the handle. The guard grappled with the crowd. The guard's glasses, knocked from his face, were stomped on by other persons. An attempt was made to grab the guard's gun. Another guard pulled the guard inside and closed the door [R.T. p. 479, line 22; p. 480, line 15]. At this point an ashtray

2'x2½' was knocked over and broken. One person, Arnold Boyd, seeing uniformed and helmeted police officers inside the Administration Building, stated "Let's get those mother fuckers" and threw the largest portion of the ashtray through the windows at the officers. The police came out of the Building and the crowd dispersed. As one officer attempted to apprehend someone, another individual jumped on his back. Two officers came to the other officer's assistance. A third individual from the crowd dove on top of all the officers [R.T. p. 480, lines 16-26; p. 481, lines 1-26; p. 482, lines 1-5; p. 1111, line 4].

As the group dispersed, they attempted to pull iron guidelines from the ground. They broke wood supports for the trees. They ran on roofs of parked cars and jumped up and down. Petitioner Lewis took a handmike and threw it against the window of an unmarked police vehicle. The crowd, screaming profanities and hollering "pig" would move up to police lines and stop. They would taunt the officers and then fall back [R.T. p. 482, lines 15-20; p. 483, lines 14-26].

After the march Whisenhunt heard two conversations between 15-20 members of the BSU and between 12 members of the SDS. Both conversations had to do with bringing guns on campus on January 9 [R.T. p. 487, lines 4-18].

The SDS had plans for a confrontation with the police on January 9. They were giving instructions regarding the 9th: bring helmets; wear heavy clothing; girls to remove pierced earrings; be prepared for confrontation [R.T. p. 488, lines 21-26].

A member of the BSU group indicated that he was going to bring his "45" the next day and he was "going

to get them". The group cheered. The group was going to form a telephone chain to friends in Pacoima to bring weapons and fighting clothes. One individual, planning to bring Molotov cocktails, indicated that if they didn't get what they wanted, they would burn the campus down. The conversations were reported to the Post and to Sergeant Isbell [R.T. p. 490, lines 1-26; p. 492, lines 15-16].

On January 9, 1969 Whisenhunt arrived at Valley State at 8:00 A.M. Members of the SDS were discussing a confrontation with police. Seven of the twelve SDS people that Wisenhunt had seen on January 8 were present at this time. Four of them were in the cafeteria by the first-aid station. Girls were carrying helmets. Chairs were being removed from the cafeteria [R.T. p. 496, lines 12-15; p. 497, lines 11-13; p. 499, lines 15-16; p. 499, lines 22-24].

Three other SDS students were outside at another first-aid station. There were bandages and other medical paraphernalia. There were four individuals with redcross armbands. These observations were reported to the Post [R.T. p. 502, lines 5-6, p. 503, lines 17-23; p. 506, lines 16-17].

Six persons, previously seen with SDS groups, were carrying walkie talkies. They were "testing" with such phrases "do you see any police." [R.T. p. 507, lines 16-18; p. 509, lines 5-21; p. 510, lines 15-16].

As the crowd increased, Whisenhunt made four calls to the Mobile Command Post before 9:30 A.M. He reported that speakers were giving "rights", advising of bail bondsmen and giving phone numbers. Speakers also urged the groups to take their seats [R.T. p. 521, lines 1-26; p. 524, line 17].

Ten members of BSU group observed by Whisenhunt on January 8 were seen by him in the group on January 9th. Numerous helmets were observed in the crowd. People were wearing heavy clothing as well as combat-type boots. Speakers were urging a confrontation with the police [R.T. p. 525, lines 24-25; p. 527, lines 1-19].

During this time Whisenhunt heard, three or four times, administrators from the college announcing that a state of emergency existed and the campus was closed to rallies [R.T. p. 529, lines 10-13; p. 530, lines 12-13].

At 10:15 A.M. Whisenhunt observed an individual with a rock three inches in diameter. A female with an armband and a helmet came over to the person, took the rock, wrapped it in newspaper and put it in a trash container. She made two similar trips [R.T. p. 535, lines 10-11; p. 536, lines 1-10]. Whisenhunt also observed what appeared to be a can of mace carried by someone seated in the forum [R.T. p. 540, lines 20-22]. Dave Buck, Chief of Plant Operations, testified that there were no rocks in the area in that windows were broken in the past. There were rocks no smaller than 350 pounds for ornamental purposes [R.T. p. 1255, lines 17-21; p. 1256, lines 8-26].

A male negro, aged 19, who on January 8, 1969 stated he was going to bring a "45" was present from 8:15 A.M. on, on January 9, 1969 R.T. p. 547, lines 9-18]. At 8:15 A.M. Whisenhunt advised the Mobile Command Post that part of the group mentioning guns on January 8 were present on January 9 [R.T. p. 1129, lines 1-10].

On November 4, 1968 Sergeant Frank Isbell was present at Valley State. He observed 40 male Negroes with BSU "Tee shirts" enter the Administration Building and go to the Fifth floor. Isbell saw BSU members standing by the door which was locked from inside. He identified himself and demanded entrance. Nothing was said [R.T. p. 1217, lines 12-17; p. 1220, lines 1-2].

Another group involving SDS students including Petitioners Lee and Fried took over the second floor. Fried told Isbell that SDS was supporting their black brothers. "If the police are going to come in here, they are going to have to break this door down." The groups left at 4:00 P.M. [R.T. p. 1222, lines 1-9; p. 1225, lines 12-26; p. 1229, lines 11-13].

Isbell was present every day on campus from November 4, 1968 to February, 1969. He would meet with officers Whisenhunt and Vuchsas daily. They would meet individually, telephonically and collectively at debriefings [R.T. p. 1229, line 21; p. 1230, lines 19-23; p. 1232, lines 13-19]. What was told to Isbell would be related throughout each day to Captain Lembke, Lieutenant Rock and Dr. Spencer [R.T. p 1233, lines 12-18]. Whisenhunt's statements about bringing guns was related to Lembke [R.T. p. 1234, lines 1-6]. The presence on January 9 of people who discussed guns on January 8 was referred to Lembke [R.T. p. 1327, lines 6-12]. Petitioners Fried, Lee and Tempkin were giving instructions to persons assembled in the Forum. Fried and Lee told the group to ignore Oviatt's declaration. Tempkin told the females to remove their jewelry. Lee, after hearing the sound truck statement by a campus administrator, stated "we do not have to disperse." Some of the speakers indicated that the people should "prepare for battle." Lee and Temp-

kin had helmets. Faculty members wearing white armbands were discussing tactics with the students. Isbell observed Graves, Klotz, Nidoroff and Hairston, professors, who had signed the letter to Oviatt [R.T. p. 1330, lines 20-26; p. 1335, lines 10-26; p. 1336, lines 19-23; p. 1340, lines 15-16].

Among the persons present at 8:00 A.M. in the Forum were petitioners Lee, Fried, Tempkin of the SDS and petitioners Burwell and Lewis of the BSU. Burwell told the crowd that the "12 BSU demands are going to be met. They are going to be faced up to by this administration or we are going to get them by any means necessary . . . and I mean by any means necessary." By 8:45 A.M. the crowd had grown from 100 to 250. Every thing that Isbell reported to Lembke was reported prior to Lembke directing Lieutenant Sonlitner to issue the dispersal order [R.T. p. 1337, line 12; p. 1428, lines 13-20; p. 1430, lines 9-13; p. 1431, lines 24-26].

Captain E. M. Lembke returned to Valley State at 9:45 A.M. on January 9, 1969. He observed students and nonstudents in the Forum Area. Speakers were telling people to ignore the order of Oviatt. Lembke was told of a bomb threat to the Administration Building. There was a report that a vehicle arrived on campus with five students wearing what appeared to be helmets. Lembke received reports from Isbell [R.T. p. 1469, lines 9-19; p. 1466, line 26; p. 1467, line 5-20].

Lembke formed the opinion that the crowd gathered there was an unlawful assembly. It was his opinion that leaders he was familiar with had an ability to cause them to proceed toward an unlawful act. At 9:41 A.M. he told Lieutenant Sonlitner to declare the assembly unlawful [R.T. p. 1468, lines 7-20].

Many events of the past were considered by Lembke:

November 4, 1968: The BSU and the SDS took over some of the floors of the Administration Building. Dr. Blomgren, the president, reported that a member of the BSU separated staff and administrators into various rooms. Blomgren was put in a room and not permitted to leave. Weapons were in evidence. Once BSU demands were signed, the BSU left. Dr. Spencer had been kicked in the chest [R.T. p. 1474, lines 19-26; p. 1475, lines 1-5].

December 4, 1968: Lembke received a report that there had been a faculty educational policy meeting which was disrupted by Archie Chatman. There were extreme obscenities to the point of disruption [R.T. p. 1480, lines 20-26; p. 1481, lines 11-20].

December 8, 1968: Lembke received a report that a fire gutted the interior of some offices on the campus. Lembke went to observe the scene. Eugene King was arrested.

December 19, 1968: Lembke was on campus between 11:00 A.M. and 1:00 P.M. He observed people over 40 years of age selling literature at tables. He later received reports that the tables had been overturned by Negro students. Officer Weinbeck observed a male Negro carrying a billy club secreted under his jacket. Winston Freeman was arrested with the billy club. Fights occurred [R.T. p. 1489, lines 10-11; p. 1491, lines 7-17; p. 1687, line 9].

December 20, 1968: Lembke got to Valley State at approximately 10:30 A.M. He received reports that a fight had broken out in the Forum. A SDS man was hurt [R.T. p. 1503, lines 20-23; p. 1506, lines 16-18].

January 6, 1969: Lembke received a report that University Division radio officers had stopped a group of 20 Negroes. They were Black Panthers who were being transported in three cars in the area of Manual Arts. They were distributing leaflets urging people to go to Valley State at noon on January 7. One of the individuals lived in San Francisco. One of the vehicles was registered to an address in San Rafael [R.T. p. 1509, lines 6-14; p. 1691, lines 9-10].

January 7, 1969: Lembke arrived at Valley State at noon. There were 200 people in the Forum. Speakers including nonstudents Ida Mae Willis and petitioner Rick Williams were speaking about a need for change on campus, and the demands of the BSU. Archie Chatman and petitioner Burwell referred to whatever means were necessary; that it was time to take some action. The crowd, 200 of them, marched to the Administration Building. Oviatt came out to speak. He had to be escorted back by campus police. Lembke observed flailing fists [R.T. p. 1512, lines 6-10; p. 1515, lines 11-14; p. 1616, line 5].

January 8, 1969: There was a crowd in the Forum at 8:00 A.M. Officer Weinbeck heard a girl in the crowd advocating a confrontation with the police [R.T. p. 1620, lines 8-14]. At 11:00 A.M. Archie Chatman, petitioner Burwell, and petitioner Lewis were speaking in the Forum. Lewis stated that "you are going to feel black power." Burwell said "If we don't get our demands, we are going to tear this mother fucker up." Chatman stated that "Reddin can stuff these community relations officers up his anal opening as far as possible." Jerome Waker said "We know where the front door is and we are going to kick it down. The church is almost out. Words are not doing the job." Another

speaker indicated that they would get what they wanted by violence or non-violence [R.T. p. 1620, lines 8-14; p. 1621, lines 22-26; p. 1622, lines 1-5].

The crowd then walked to the Administration Building. Margaret Wright and Rev. Hargett were leading the group. Dean Wallis told the leaders that if they entered they would be arrested. Hargett announced to the crowd to enter the Building in single file. Members of the crowd struggled with the security guard at the door. The door was forced open and people started entering.

Lembke returned to the lobby. Lieutenant Sonlitner obtained a police vehicle and announced to the crowd that it was an unlawful assembly and command them to disperse. Crowd did not disperse [R.T. p. 1622, lines 6-26; p. 1624, lines 1-26; p. 1627, lines 17-23]. The crowd broke up at 2:30 P.M.

Officer Vuchsas informed Lembke that members of the crowl intended to return with weapons the next day. Officer Meltzer told Lembke that someone had been moving through the crowd asking for matches prior to crowd entering Administration Building. On the evening of January 8, Sergeant Isbell relayed a summary of his intelligence information to Lembke [R.T. p. 7631, lines 18-23; p. 1635, lines 4-8; p. 1641, lines 2-21].

January 9, 1969: When Lembke drove to Valley State he had not reached definite conclusion to declare unlawful assembly. It had been a consideration every day [R.T. p. 1642, line 21; p. 1643, line 11]. After observation that morning Lembke determined that the assembly was unlawful. He did not feel there was another way. Even if Pacoima meeting had not existed and

even if Oviatt had not issued his order, Lembke would have done the same [R.T. p. 1644, lines 1-15; p. 1648, lines 18-20; p. 1768, lines 1-2]. An important factor was that this was the first time that there had been reference to bringing weapons, guns, or Molotov cocktails on campus on a specific date [R.T. p. 1821, lines 15-21].

Lembke's specific reasons for declaring the assembly unlawful was stated at [p. 1647, lines 10-26]. "Based upon my past experience and observations of that morning, I had a fear for the safety of the people on that campus and for the property on that campus, and I strongly believe that the leaders in the crowd were capable of moving that crowd towards objectives that would have been unlawful."

On January 9, 1969 Lieutenant Joseph Sonlitner of the Los Angeles Police Department went to the Forum Area at 9:15 A.M. [R.T. p. 1856, lines 22-25]. After being told by Captain Lembke to issue a dispersal order, Sonlitner got into a Police Department soundtruck. The truck containing nine megaphones was set at 8½ which amplification has a range of fourteen blocks. The nine horns were directed to the Forum Area [R.T. p. 1, lines 9-26; p. 1857(a), lines 21-22].

At 9:41 A.M. Sonlitner gave the following order:

> "Attention . . . Attention. This is Lieutenant Joseph Sonlitner, a peace officer for the State of California and a police officer for the City of Los Angeles. The campus has been closed to all rallies by Acting President Dr. Oviatt. I hereby declare this assembly to be unlawful and command you in the name of the People of the State of California to immediately disperse" . . . .

> "You have exactly three minutes to leave the area. Anyone remaining in the area will by physically arrested . . . ."

At 10:05 A.M. Sonlitner repeated an almost identical order. At 10:10 A.M. Sonlitner announced:

> "You have been allowed ten minutes to leave the area. My officers are going to be moved in and begin making arrests."

Subsequent dispersal orders were given at 10:41 A.M., 10:52 A.M., 11:12 A.M., 11:15 A.M. and 11:54 A.M. [R.T. p. 1858, line 21, p. 1859, line 24].

Petitioner Mickey was arrested by Los Angeles Police Officer K. L. Moody between 11:00 and 11:25 A.M. in the Forum Area. Mickey was on the stage during part of this time. He made no attempt to leave. He was arrested for failure to disperse [R.T. p. 1908, lines 9-21].

I.

Collateral Estoppel Is Inapplicable to Petitioners' Case.

Petitioners argue that because some defendants were acquitted in other "Valley State" cases then petitioners also should have been acquitted. That argument was rejected by the court in *Uptgraft* and in *Hairston*.

In *People v. Scoglio*, (1969) 3 Cal. App. 3d 1, 4, 82 Cal. Rptr. 869, the court stated "It is well settled that where the same criminal act or transaction gives rise to criminal liability in more than one defendant, a judgment acquitting one defendant does not operate as *res judicata* in the prosecution of another defendant".

Therefore, acquittals of other defendants did not bind the prosecution in the instant case even though the acquittals did arise out of "Valley State" cases. The *Scoglio* decision has not been affected by *Ashe v. Swenson*, (1970) 397 U.S. 436, 25 L. Ed 2d 469.

II.

The Order of Dr. Oviatt Was Valid. It Was Not a Violation of the Right of Free Speech.

In *Times Film Corp. v. Chicago*, (1961) 365 U.S. 43, 47, 5 L. Ed. 2d 403, 406, this Court declared that "it has never been held that liberty of speech is absolute. Nor has it been suggested that all previous restraints on speech are invalid."

In *Carroll v. Commissioners*, (1969) 393 U.S. 175, 21 L. Ed. 2d 325, 330-331, this Court did not decide the "thorny problem" of whether the injunction could be justified. The court recognized that "there are special limited circumstances in which speech is so interlaced with burgeoning violence that it is not protected by the broad guarantee of the First Amendment."

Dr. Oviatt ordered that "all demonstrations, assemblies, rallies, and meetings in the Open Forum or elsewhere, except for classes are prohibited. The meeting in the Open Forum for 12:00 Noon [January 9, 1969] has been cancelled. This is an exxtreme situation precipitated by the events of the past few days. There has been a steady escalation of disruptions of normal campus activity."

In *Tinker v. Des Moines Community School District*, (1969) 393 U.S. 503, 21 L. Ed. 2d 731, 737, this Court referred to the fact that the wearing of armbands "was entirely divorced from actually or potential-

ly disruptive conduct by those participating in it. It was closely akin to 'pure speech' which the court has held is entitled to protection.

In *United States v. O'Brien*, (1968) 391 U.S. 367, 376, 20 L. Ed. 2d 672, 679, this Court refused to accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea. The Supreme Court has repeatedly held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.

"To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherness of that interest" (*O'Brien, supra*, p. 680). The "descriptive terms" referred to above show the governmental interest Dr. Oviatt had in preserving the "general welfare" of the campus.

The President of the State College is responsible for the educational effectiveness, academic excellence and general welfare of the College over which he presides

|See: People's Ex. 7|. The President of each State College has the authority and the responsibility to do every thing possible to prevent the disruption of the educational process. In the event that disruption of the educational process threatens or occurs, the President shall use al means at his disposal, including police when necessary, to maintain or restore the normal educational process |See: People's Ex. 8|. The Resolutions of the Board of Trustees |Ex. 7, 8, 9| would appear to indicate that Dr. Oviatt has express authority to "close" the campus to protect the "general welfare of the college."

"Under the circumstances, the administrative order was fully justified. Dr. Oviatt would have been derelict in his duty if he had not acted as he did." (*Hairston, supra*). In his order declaring "a state of emergency" Dr. Oviatt stated that "we hope to restore this normal function |that of a college maintaining an environment for learning and dialogue| as soon as the threat to persons and property subsides." The Emergency Order was terminated on January 10, 1969 at 2:00 A.M. |R.T. p. 301, lines 6-8|.

"A school administrative order is usually adopted for reasons other than violence, and relates merely to what is best for the school. Dr. Oviatt was acting as a reasonable school administrator and made an order well within his authority (since he could have closed school altogether) and so explicit and simple that anyone who wanted to understand it could understand it . . . . Any reasonable student would have understood that the prohibition was for the duration of the emergency only as it expressly stated, and would have known exactly what emergency was referred to." (*Hairston*).

"The record shows that Dr. Oviatt did not act hastily, but with great restraint. We must remember that the students who acted with violence were not thereby asserting constitutional rights but were selfishly interfering with the constitutional rights of others—and that such others, of all races, greatly outnumbered the relatively few students who resorted to violence. School administrative officials must protect the constitutional rights of all—even such a majority. Devoting a school exclusively to classes for the benefit of students who wished to learn appears to us to be a proper school purpose under the circumstances presented here." (*Hairston*).

In *Carroll, supra,* p. 332 this Court refers to the fact that the individuals against whom the injunction was sought were present in the town of Princess Anne. They had held a rally there. Some of them were actually served with the writ of injunction. *Carroll* involved only one group—the National States Rights Party—which was restrained by the injunction.

In the instant case, numerous groups and individuals were involved: The Black Students Union; students for a Democratic Society; The Southern Christian Leadership Conference; Students from other colleges; Margaret Wright and other individuals not connected with Valley State College. Dr. Oviatt should not have been forced to contact each and every group and/or individual—student and/or nonstudent—that had been involved in previous threats to the general welfare of the campus. Dr. Oviatt as Acting President had the right and the duty to prohibit "all demonstrations, assemblies, rallies and meetings."

In the *Carroll* case, *supra,* p. 331, the court stated that "we do not here challenge the principle that there

are special limited circumstances in which speech is so interlaced with burgeoning violence that it is not protected by the broad guarantee of the First Amendment. . . . See also . . . *Milk Wagon Drivers Union v. Meadowmoor Dairies*. . . ."

In *Milk Wagon Drivers Union v. Meadowmoor Dairies*, (1941) 312 U.S. 287, 85 L. Ed. 836, 842 Justice Frankfurter declared:

> ". . . acts which in isolation are peaceful may be part of a coercive thrust when entangled with violence. The picketing in this case was set in a background of violence. In such a setting it could justifiably be concluded that the momentum of fear generated even though future picketing might be wholly peaceful. We find nothing in the Fourteenth Amendment that prevents a state if it so chooses from placing confidence in a chancellor's decree, and compels it to rely exclusively on a policeman's club."

In *Goldberg v. University of California*, (1967) 248 Cal. App. 2d 867, 879, the court declared that the function of the University is to impart learing and to advance the boundaries of knowledge. This carries with it the administrative responsibility to control and regulate that conduct and behavior of the students which tends to impede, obstruct or threaten the achievements of its educational goals. The University has the power to formulate and enforce rules of student conduct that are appropriate and necessary to the maintenance of order and propriety. Doctor Oviatt's order was valid.

III.

The Order of Captain Lembke Declaring the Assembly Unlawful Was Valid. It Was Not a Violation of the Right of Free Speech.

Whenever two or more persons assembled together to do an unlawful act and separate without doing it or advancing toward it or do a lawful act in violent, boisterous, tumultuous manner, such assembly is an unlawful assembly.

(Penal Code Section 407, as it existed January 9, 1969)

Every person remaining present at the place of any riot, rout or unlawful assembly, after the same has been lawfully warned to disperse, except public officers and persons assisting them to disperse the same, is guilty of a misdemeanor.

Penal Code Section 409.

These are separate offenses and a defendant violates Section 409 even though the defendant has been found not to have participated in the unlawful assembly itself. (*People v. Anderson*, (1931) 117 Cal. App. Supp. 763, 769; *In re Bacon*, (1966) 240 Cal. App. 2d 34, 49). Before a person may be convicted for a violation of Penal Code Section 409, the assembly from which the person was ordered to disperse must, in fact, be unlawful.

In determining that the assembly on January 9, 1969, was unlawful, the court in *Uptgraft* decided that the rights of assembly and speech were not constitutionally abridged by the police in terminating the assembly by ordering it to disperse.

In *Uptgraft* the court stated that the "arrests must be justified . . . upon the basis of whether, from all

the circumstances, reasonable men could draw an inference that history was about to repeat itself and that the ultimate objective of the assemblage was not merely to provoke violence, but to actually engage in violence." "This court would not say as a matter of law that Captain Lembke erroneously drew the same inference. Thus his warning was lawful."

The activity of November 4, December 4, 8, 19, and 20, January 6, 7, 8 and 9 cannot be "entirely divorced from actually or potentially disruptive conduct" as was the mere wearing of armbands in *Tinker v. Des Moines Community School District*, (1969) 393 U.S. 503, 21 L. Ed. 2d 731, 737. A reasonable man would have concluded that the "meeting" in the Forum on January 9, 1969, was going to result in disruptive conduct.

People who want to propagandize protests or views have no constitutional right to do so whenever and however and wherever they please. (*Adderley v. Florida*, (1966) 385 U.S. 39, 47-48, 17 L. Ed. 2d 149, 156). The time, manner and place for the expression of ideas in the streets, whether by speaking, demonstrating or picketing, are subject to regulation and control by the police in the process of maintaining public order. (*People v. Huss*, (1966) 241 Cal. App. 2d 361, 370).

First Amendment provisions are not absolute, but must be balanced against other public interests. (*American Communications Ass'n, v. Douds*, (1949) 339 U.S. 389, 94 L. Ed. 925; *Breard v. Alexandria*, (1951) 341 U.S. 622, 95 L. Ed. 1233). The general welfare of the campus has to be balanced against the "right" of the students to disrupt campus activities.

The events of prior days constituted an "appreciable inference" with normal campus activities. (*In re Hoffman*, (1967) 67 Cal. 2d 845, 852). Therefore, the arrests were not an abridgement of freedom of speech.

In *In re Bacon*, (1966) 240 Cal. App. 2d 34, 48, the court declared that there can be little doubt that Section 409, by its fair import, can encompass under applicable circumstances activity which consists in the occupying of an area, place or establishment for the purpose of an organized protest against some grievance.

Respondent contends that the individuals who gathered in the Forum area were assembling to commit an unlawful act that of gathering to breach the peace and to disrupt the general welfare of Valley State College. In *Coverstone v. Davies*, (1952) 38 Cal. 2d 315, the court indicated that assembling for an illegal purpose renders the action of the group knowingly participating therein an unlawful assembly.

In *Carrillo v. Hayakawa*, (June 27, 1969) No. 50808, United States District Court for the Northern District of California, the three judge court decided that "unlawful act" in Penal Code Section 407 refers to criminal conduct prohibited by state law and that the average person would so understand. "Construed in this manner, the first part of Section 407 is neither 'vague nor overbroad nor unduly suceptible of arbitrary enforcement."

The persons in the Forum Area assembled together to disturb the peace and disrupt the general welfare of the campus. This had happened on the days previous whenever persons assembled together. In *Landry v. Daley*, (1968) 280 F. Supp. 938, the court stated that demonstrations lose their constitutional protection

if the participants engage in violence, and, under certain circumstances, conduct short of violence may also subject demonstrators to arrest or dispersal. Respondent contends that the facts presented herein come within that "conduct short of violence" where those assembled could be dispersed and arrested for their failure so to do.

In light of the past events on campus, Lembke had the right and duty to declare the assembly unlawful. He did not have to wait until an actual riot broke out, resulting in bloodshed and property damage, before he was permitted to act. Lembke did not have to delay his action until the fountain of knowledge at Valley State College had become a blood bath amidst a campus of burning buildings. His order was valid. As declared by the court in Uptgraft, the declaration of the unlawful assembly was "an example of forthright law enforcement designed to anticipate and avoid violence."

Conclusion.

A review of the voluminous record before this Court clearly demonstrates that the convictions were not an abridgement of petitioners' rights of free speech and freedom of assembly.

California Penal Code Sections 407 and 409 are constitutional. The statutes are not so broad, vague, indefinite or lacking in definitely ascertainable standards as to be unconstitutional. The statutes are not so vague that men of common intelligence must necessarily guess at the meaning and differ as to its application (*Cameron v. Johnson*, (1968) 390 U.S. 611, 615, 20 L. Ed. 2d 182, 187).

Petitioners' convictions were not a violation of the First Amendment (*People v. Upigraft*, (1970) 8 Cal. App. 3d Supp. 1, 87 Cal. Rptr. 459; *People v. Hairston*, (1970) 8 Cal. App. 3d Supp. 19, 87 Cal. Rptr. 470; *Stotland v. Pennsylvania*, (1970) 26 L. Ed. 2d 83).

The Petition for Writ of Certiorari does not disclose that there has been a violation of petitioners' rights under the Federal Constitution, nor does it show that the highest court of the State of California in this proceeding has decided a Federal question in conflict with applicable decisions of this Court or decided a Federal question of substance not theretofore determined by this Court.

Respectfully submitted,

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